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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

JOHNNIE A. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK R. MARO, ESQUIRE
Counsel of Record
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Attorney for Petitioner

27pp

QUESTION PRESENTED

I.

Whether the Court of Appeals failed to appropriately exercise its jurisdiction and improperly dismiss Smith's appeal of a District Court's denial for application of a retroactive amendment to the Sentencing Guidelines predicated upon the fact that Smith filed his appeal under the auspices of 28 U.S.C. 2255 as compared to taking same under a direct appeal when a failure to allow the appeal would be a miscarriage of justice as reflected by this Court in **Sunal v. Large**, 332 U.S. 174, 178, 67 S.Ct. 1588 [1947].

PARTIES TO THE PROCEEDINGS

The Petitioner in this criminal case is the Appellant/Defendant in this subject action. The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., infra, A) is not reported.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on April 28, 1999. The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 U.S.C. Section 3582[c][2]; Sentencing Guideline 1B1.10; Section 2D1.1[d][1] and 2D1.1[c]; as well as 28 U.S.C. §2255.

STATEMENT OF THE CASE

1. On or about the 24th day of March, 1993, an indictment was returned by the grand jury charging the Appellant with one Count of conspiracy to traffic cocaine base. A warrant was subsequently issued and Appellant was arrested on the 28th day of April, 1993.

2. That the matter went forth to trial and the defendant was convicted by a jury. At the time of sentencing on July 29, 1993, the defendant was scored at a base level of 42 with a subsequent two point enhancement, and was sentenced at level 44. criminal history 3.

3. That as a result of 2D1.B[c], the drug quantity table of the Federal Sentencing Guidelines was amended with all changes to become effective on September 23, 1994.

4. Predicated upon same, the defendant filed a motion with the sentencing court for a base level reduction from 42 to 38.

5. That the District Court entered its order on the 13th day of November, 1997, denying appellant's motion.

6. Appellant did not take a direct appeal within 10 or 30 days, thereafter, but did file a notice of appeal on November 12, 1998 under the auspices of alleged error constituting a "fundamental defect" which inherently results in an incomplete miscarriage of justice and omission inconsistent with the demands of fair procedure under the auspices of a 28 U.S.C. §2255, which would reflect actual prejudice [the non-appropriate application of an amendment which would authorize the possible reduction of his sentence].

7. That the appellate court dismissed the action for lack of jurisdiction on April 28, 1999.

8. The appellant brings this action.

REASONS FOR GRANTING THE PETITION

1. Smith claimed that his sentence is contrary to a subsequently enacted amendment which if appropriately applied by the district court, may have afforded him a reduction in sentence thus the failure to apply the retroactive amendment [1] creates a fundamental defect which inherently results in a complete miscarriage of justice or is an omission inconsistent with the right of dementory demands of fair play [2] creates actual prejudice and makes the existing sentence one of continued illegality. See, **Sunal v. Large, 332 U.S. 174, 178, 67 S.Ct. 1588 [1947]; Reed v. Farley, 512 U.S. 339, 114 S.Ct. 1291 [1994]; Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468 [1962].** Also see, **Grant v. United States, 72 F.3d 503, 506 [6th Cir.] cert. den. 517 U.S. 1200, 116 S.Ct. 1701 [1996]; see also, United States v. Payne, 99 F.3rd 1273, 1281-82, [5th Circuit 1996]; Graziano v. United States, 83 F.3rd 587, 589-90 [2nd Cir. 1996].**

CONCLUSION

This Petition for a Writ of Certiorari should be granted for the purpose of clarification of the law concerning jurisdiction of the appellate court when a sentencing issue is raised under 28 U.S.C. §2255 as compared to a direct appeal for the purposes of determination and evaluation as to whether or not there is a "miscarriage of justice" or if there is an "omission" inconsistent with demands of fair "procedure".

DATED the 26th day of July, 1999.

Respectfully submitted,

JACK R. MARO, ESQUIRE
Counsel of Record
Post Office Box 3868
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(352) 620-0797

Attorney for Petitioner

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 99-2015

UNITED STATE OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNIE ANTONIO SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before **HATCHETT, Chief Judge, TJOFLAT and EDMONDSON, Circuit Judges**

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. Smith's notice of appeal

clearly evinced his intent to appeal the November 13, 1997, denial of his motion for reduction of sentence, 18 U.S.C. § 3582. In a criminal action, a notice of appeal must be filed in the district court within ten days of entry of the judgment and commitment order being appealed. Fed.R.App.P.4(b). Smith's notice was thus untimely when filed in the district court on November 12, 1998, nearly 12 months after entry of judgment. This Court may not extend the time for filing an appeal. See Fed.R.App.P. 26(b). In criminal actions, however, this Court customarily treats a late notice of appeal, filed within the additional 0 days during which an extension of the appeal period is allowed, as a motion for extension of time and remands to the district court for a determination of excusable neglect. See

Sanders v. United States, 113 F.3d 184, 186 (11th Cir. 1997); see also Fed.R.App.P. 4(b). Because Smith's notice of appeal was filed outside the time permitted for an extension of the appeal period, no relief is available to excuse the untimeliness of his notice, and there is not need to remand for a finding of excusable neglect. Accordingly, we lack jurisdiction over the appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CASE NO. 97-111-Civ-Oc-10
93-7-Cr-Oc-10

JOHNNIE ANTONIN SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

NOTICE OF APPEAL

COMES NOW, JOHNNIE ANTONIN SMITH, by and through his undersigned attorney, and files his Notice of Appeal of the Court's **Order of November 13, 1997**, relating to the finding in paragraph 1 that the Defendant's Motion for a Sentence Reduction, pursuant to **18 U.S.C. § 3582[c][2]**, was denied.

Dated this 10th day of November, 1998.

RESPECTFULLY SUBMITTED,

JACK R. MARO, ESQUIRE
Attorney for Petitioner
Post Office Box 3868
Ocala, FL 34478
(352) 620-0797
Florida Bar No. 174775

/s/_____
JACK R. MARO, ESQUIRE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **W. RONALD JENNINGS**, Asst. U.S. Attorney, Post Office Box 600, Jacksonville, FL 32201, this 10th day of November, 1998.

/s/_____
JACK R. MARO, ESQUIRE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CASE NO. 97-111-Civ-Oc-10
93-7-Cr-Oc-10

JOHNNIE ANTONION SMITH,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

_____/

O R D E R

The Petitioner, represented by counsel, has filed two motions seeking to have the sentence reduced or vacated. In his first motion (Doc. 217), made pursuant to 18 U.S.C. §3582(c)(2), the Petitioner argues that subsequent amendments to the guidelines applicable to his sentence warrant a reduction. The Petitioner's second motion

(Doc. 219), made pursuant to 28 U.S.C.§2255, asserts an ineffective assistance of counsel claim arising out of an alleged conflict of interest among the Petitioner, his attorney and a codefendant in this case. The Court will consider each motion in turn.

BACKGROUND

On May 26, 1993, the Petitioner and another defendant were charged, in a one count superseding indictment, with conspiracy to distribute more than fifty grams of cocaine base. See, 21 U.S.C. §846. On July 29, 1993, after a jury trial, the Petitioner was convicted of the offense charged. The Petitioner was subsequently adjudicated guilty and, on October 1, 1993, was sentenced to a term of life imprisonment (Doc. 163).

At the sentencing hearing held on October 1, 1993, the Court, in accordance with the presentence investigation report prepared by the Probation Officer, concluded that the Petitioner was responsible for conspiring to distribute in excess of fifteen kilograms of cocaine base. Accordingly, the Petitioner's base offense level, for the purposes of the applicable sentencing guidelines, was established at forty-two. U.S.S.G. §2D1.1(c)(1) (1993). The Petitioner's offense level was increased by four -- two levels for possession of a dangerous weapon in the commission of the offense and two levels for his role in the offense -- making his total offense level forty-six. U.S.S.G. §§ 2D1.1)(b)(1); 3B1.1(c)(1993). The Probation Officer determined, and the Court concluded, that

the Petitioner was properly placed in criminal history category five, yielding a guideline sentence, which the Court imposed, of life imprisonment.

D I S C U S S I O N

A. §3852(c)(2) Motion to Reduce Sentence

The Petitioner has moved (Doc. 217) to reduce his sentence, pursuant to 18 U.S.C. §3852(c)(2), claiming that subsequent amendments to the sentencing guidelines operated to reduce his total offense level to 42. In 1994 the guidelines were amended to reduce the base offense applicable to the amount of cocaine base attributed to the Petitioner from forty-two to thirty-eight. [1]

---

[1] The Petitioner states that the purportedly retroactive amendment to the drug quantity table in §2D1.1 was accomplished by the 1995 amendments. Actually, it appears that the applicable amendment became effective on September 23, 1994. U.S.C.G., Amendment 505 (1994).

U.S.S.G. § 2D1.1(c)(1)(1994). The Petitioner argues that the amendment is retroactive and, when applied, reduces his total offense level to forty-two. At offense level forty-two, criminal history category five, the applicable guideline range is three hundred and sixty months to life. The Petitioner requests that the Court reduce his sentence and impose a definite term of months.

The Petitioner's claim that the amendment to the drug quantity table at U.S.S.G. § 2D1.1(c) is retroactive is simply incorrect. § 1B1.10 of the Guidelines provides the policy statement governing the retroactivity of guideline amendments for the purposes of § 3582(c)(2) motions. Specifically, § 1B1.10(a) of the Guidelines provides:

> Where...the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized...[i]f none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment... is not authorized.

The amendment which the Petitioner maintains operates to reduce his base offense level, Amendment 505 to the 1994 Sentencing Guidelines, is not listed as a retroactive amendment in § 1B1.10(c). As such, the Petitioner's claim that he is entitled to a reduction in sentence on account of that amendment is clearly with out merit and his motion is, therefore, due to be denied.

B. Motion to Vacate Sentence under § 2255

The Petitioner has also filed a motion (Doc. 219) to vacate his sentence under 28

U.S.C. § 2255. The Petitioner claims that this counsel during trial and sentencing -- because of his professional relationship with counsel for the Petitioner's co-defendant -- suffered from an actual conflict of interest such that his representation of the Petitioner was unconstitutionally ineffective in violation of the Sixth Amendment to the Constitution. Upon review of the motion and record, the Court cannot conclude that "the files and records of the case conclusively show that the prisoner is entitled to no relief...." 28 U.S.C. § 2255. The government should be directed to respond.

Accordingly, upon due consideration,

(1) The Petitioner's motion for a sentence reduction (Doc. 217) pursuant to 18 U.S.C. § 3582(C)(2) is DENIED.

(2) The government is DIRECTED to file with the Court and serve on the Petitioner, within **twenty (20) days of the date of this Order**, a memorandum in opposition to the Petitioner's motion to vacate his sentence (Doc. 219) pursuant to 28 U.S.C. § 2255.

IT IS SO ORDERED.

DONE and ORDERED in Jacksonville, Florida this 13th day of November, 1997.

/s/_____
WILLIAM TERRELL HODGES
United States District Judge

Copy to counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 93-7(S1)Cr-Oc-10

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHNNIE A. SMITH
ID# 13964018
Place of Confinement: USP Lompoc

Defendant.

_____/

MOTION UNDER 18 U.S.C., SENTENCING GUIDELINES 1B1.10 FOR REDUCTION OF SENTENCE BASED ON GUIDELINE AMENDMENT CONCERNING REDUCTION OF UPPER LIMIT OF DRUG QUANTITY TABLE

COMES NOW the Defendant, JOHNNIE A. SMITH, by and through his undersigned attorney, and files his Motion for reduction of sentence based on Guidelines Amendment concerning upper limit of drug quantity

table and would show unto this Honorable Court the basis for same, to wit:

1. That this is a Motion under **18 U.S.C. 3582C2** and **Sentencing Guidelines 1B1.10** for reduction of the sentence based on the Guideline Amendment, effective November 1, 1995, concerning reduction of upper limit of drug quantity table determination for sentencing purposes.

2. That the Defendant was sentenced on October 1, 1993 in the Middle District of Florida, Jacksonville, Florida.

3. That the sentence that the Defendant received was life imprisonment.

4. That the Defendant was in fact convicted of a drug trafficking offense and did receive a base offense level greater than 38.

5. That the Defendant's sentence was determined by using the drug quantity table in **Guideline 2D1.1**, which placed him at a level 42.

6. That there was a 2 point enhancement under **Section 2D1.1(b)(1)** relating to the finding that a dangerous weapon was possessed.

7. That the total offense level upon which the Defendant was sentenced was 44.

8. In accordance with the designated Amendment, herein, the Defendant is entitled to a downward adjustment of his base sentence from level 42 to level 38.

9. That the Defendant was sentenced under a Criminal History V and a recomputation of an offense level of 40 under the designated Criminal History would

change the Defendant's nondiscretionary life term to one of 360 months to life.

WHEREFORE, the Defendant prays entry of an Order granting his Motion for recomputation of his sentence affording him a resentencing at the low level and providing him a term of years, as compared to a life sentence and any other relief that this Court deems meet and proper.

MEMORANDUM OF LAW IN SUPPORT

Under **18 U.S.C., Section 3582(c)(2)** a defendant may file a motion with the sentencing court requesting a sentence reduction, if the Guideline range applicable to the defendant has been lowered as a result of an applicable retroactive amendment to the Guidelines Manual. Under **Section 2D1.D(c)**, unlawful manufacturing, importing, exporting or trafficking - Drug

Quantity Table, of the Federal Sentencing Guidelines has been amended, with all changes becoming effective on November 1, 1995. The upper limit of the base offense levels in the Drug Quantity Table for a level 38 (eliminating previous base offense levels of 40 and 42) did in fact go into effect. The Amendment is retroactive. The Defendant does in fact qualify under the Amendment and has standing to bring forth this request since he was sentenced on an offense level of 42.

That the Defendant would respectfully request this Court to sentence him to the lower level of the Sentencing Guideline, since it would be within the discretion of the Court to do same. The original sentence was one of a life sentence without the Court's discretion. The Defendant would

request a term of 360 months (30 years) as an appropriate sentence, which is in itself an enhanced sentence due to the fact that the Defendant was convicted for dealing in cocaine base, as compared to power cocaine. A 360 month sentence would provide the Defendant with closure to his incarceration and afford him a window of light in which to aspire to complete the sentence in an uneventful manner so that he may be once again reunited with his family.

DATED this ___ day of _____, 1996.

JACK R. MARO, ESQUIRE
Florida Bar No. 174775
Attorney for Defendant
Post Office Box 3868
Ocala, FL 34478
[352] 620-0797

/s/_____
JACK R. MARO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion Under 18 U.S.C., Sentencing Guidelines Under 1B1.10 For Reduction of Sentence Based on Guideline Amendment Concerning Reduction of Upper Limit of Drug Quantity Table and Memorandum of Law in Support has been furnished, by U.S. Mail, this ____ day of _____, 1996, to CHARLES T. TRUNCALE, Asst. U.S. Attorney, Office of the U.S. Attorney, Post Office Box 600, Jacksonville, FL 32201.

/s/_____
JACK R. MARO, ESQUIRE